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Honorable Ronald B. Leighton

Attorney for Plaintiffs

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

DONOVAN and JANICE FLECK and the  
marital community composed thereof,

Plaintiffs,

v.

NORTHSTAR LOCATION SERVICES,  
LLC, a New York Limited Liability  
Company,

Defendant.

NO. 3:11-cv-05035

PLAINTIFFS' RESPONSE TO  
DEFENDANT'S 12(b)(6) MOTION TO  
DISMISS

COME NOW, Plaintiffs, DONOVAN and JANICE FLECK, by and  
through their counsel, ROBERT MITCHELL, and respond to Defendant's  
12(b)(6) Motion to Dismiss as follows:

**I. INTRODUCTION and FACTS**

Plaintiffs' complaint asserts that Defendant's letter threatening to report a  
debt to "credit bureaus throughout the country" violated the provision of the  
Washington Collection Agency Act that prohibits debt collectors from  
threatening to impair a debtor's credit rating while attempting to collect a debt,  
*inter alia*. RCW 19.16.250(9).

PLAINTIFFS' RESPONSE TO  
DEFENDANT'S MOTION TO DISMISS

1

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1 Defendant filed this Motion to Dismiss, which is based on two distinct  
 2 theories. The first theory is that Defendant's letter could not possibly violate the  
 3 statute because the statements made therein are technically true. Defendant's  
 4 second theory is that the threat to report the debt to "credit bureaus throughout  
 5 the country" was a benign statement of the action Defendant would take and  
 6 legally could take under the law. Therefore, the statement could not have been a  
 7 "threat to impair Plaintiffs' credit rating."

8 The problems with Defendant's theories are simple and straight forward.  
 9 First, Defendant's theories are based on an unpublished state court case with  
 10 different facts, which completely missed the mark when analyzing the meaning  
 11 of the "least sophisticated consumer standard," and which directly contradicts  
 12 published federal authority on the issue. Therefore, the case should not be used  
 13 as authority to determine the merits of this case because, quite simply, there is a  
 14 reason the Court voted to not publish the ruling.

15 Second, Defendant admits that the "least sophisticated consumer standard"  
 16 applies in this case, yet Defendant completely misconstrues exactly what that  
 17 standard means. (*See Defendant's Motion at pp. 3-4, lines 18 – 23*).

18 Third, Defendant completely ignores the progeny of case law that holds  
 19 that even factually true statements can be threatening, false, or misleading; that  
 20 intent is not even an issue when examining collector communications under this  
 21 strict liability remedial statute; and Courts are directed to liberally construe the  
 22 statutes in favor of consumers.

23 Given the degree of deference Courts are instructed to give to Plaintiffs'  
 24 consumer claims, it is borderline frivolous for Defendant to suggest through its

1 12(b)(6) motion that Plaintiff's claims lack any merit whatsoever, especially  
2 where the motion is based on an unpublished state court case that directly  
3 contradicts published federal authority.

4       Regardless, because Defendant's motion presents matters outside the  
5 pleadings, Defendant's Motion to Dismiss must be treated as a Motion for  
6 Summary Judgment. *Fed. R. Civ. P. 12(b)*. As a result, Summary Judgment  
7 standards must apply and this Court is required to view all facts in a light most  
8 favorable to Plaintiffs. *Fed. R. Civ. P. 56*. Therefore, the question before this  
9 Court is whether reasonable persons could reach but one conclusion regarding  
10 whether the language contained in Defendant's collection letter was threatening  
11 in nature. *Id.*

12       Given the facts of this case and the strict manner in which collector actions  
13 are scrutinized under these strict liability remedial statutes that must be liberally  
14 construed in favor of consumers, it would be nearly impossible to determine that  
15 a reasonable juror could only conclude that Defendant's letter was non-  
16 threatening. In fact, it is not only possible but likely that reasonable jurors would  
17 find the "benign" statement harassing, abusive, threatening, and in violation of  
18 the statutes. Therefore, this Court should deny Defendant's Motion to Dismiss  
19 and allow Plaintiffs to proceed with discovery to determine what exactly  
20 Defendant's motives were in crafting and including the offending language in the  
21 collection letter at issue.

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## II. LEGAL ARGUMENT

### A. **Standard For Determining Motion To Dismiss.**

If, on a motion...to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56...

Fed. R. Civ. P. 12(b).

In this case, Defendant's Motion to Dismiss includes: 1) An unpublished state court case; 2) Facts concerning Defendant's intent; 3) Arguments concerning the "least sophisticated consumer" standard; 4) Arguments concerning the veracity of the statement contained in the collection letter at issue; as well as other issues not present in previous pleadings in this case. Therefore, pursuant to the above-referenced rule, this Court should use CR 56 to determine the proposed dismissal of this action.

### B. **Standard For Determining Summary Judgment.**

A motion for summary judgment should only be granted only when:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

CR 56(c); *IBEW, Local Union No. 46 v. Trig Electric Construction Co.*, 142 Wn.2d 431, 435, 13 P.3d 612 (2000)(citing *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)).

A material fact is a fact upon which the "outcome of litigation depends in whole or in part." *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803, 23

1 P.3d 477 (2000)(citing *Atherton Condo Apartment-Owners Ass'n Bd. Of Dirs. v.*  
 2 *Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). No genuine issue  
 3 of material fact exists if the Court, after considering the evidence in a light most  
 4 favorable to the non-moving party, concludes that reasonable persons could reach  
 5 only one conclusion. *Reynolds v. Hicks*, 134 Wn2d. 491, 495, 951 P.2d 761  
 6 (1998)(citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

7 The burden for establishing uncontroverted material facts initially rests  
 8 with the moving party. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257  
 9 (2001)(citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).  
 10 A party can meet this burden by either setting forth its version of the facts and  
 11 allege that there is no genuine issue, or the party can meet this burden by pointing  
 12 out that the non-moving party does not have sufficient evidence to support its  
 13 case. *Guile v. Ballard Community Hospital*, 70 Wn. App 18, 21, 851 P.2d 689  
 14 (1993)(citing *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912,  
 15 916, 757 P.2d 507 (1988) and *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d  
 16 216, 225 n.1, 770 P.2d 182 (1989)).

17 In this case, Defendant has not even met its initial burden because  
 18 Defendant's own pleadings illustrate that different Courts have decided the  
 19 matter differently and that the outcome is "fact" specific. The facts and law  
 20 contained in Defendant's pleadings illustrate that a genuine issue of material fact  
 21 exists in this case concerning whether reasonable minds could consider the  
 22 language contained in Defendant's letter a threat to impair Plaintiffs' credit  
 23 ratings. This matter is further complicated by the fact that the Court must  
 24 liberally construe this strict liability remedial statute to Plaintiffs' benefit.

**C. Defendant's Theory That A Technically True Statement Cannot Possibly Violate The Statutes At Issue, Especially Where Defendant Lacked Intent, Is Untrue, Unsupported, And Should Be Rejected, Especially Where It Is Contrary To The Least Sophisticated Consumer Standard, And Where It Conflicts With This Strict Liability Remedial Statute's Clear Intent That The Statute Should Be Liberally Construed To Benefit Consumers Like Plaintiffs.**

An unlawful misrepresentation need not be made willfully or intentionally. Padilla v. Payco General American Credits, Inc., 161 F. Supp 2d 264 (S.D.N.Y. 2001). More importantly, a literally true letter can still convey a misleading impression in violation of the FDCPA. Sledge v. Sands, 182 F.R.D. 255 (N.D. Ill. 1998). Most importantly, in analyzing the "False or Misleading Representations" portion of the FDCPA, and the subsequent "Least Sophisticated Consumer" standard adopted to interpret the same, one Court stated:

In the general context of consumer protection - of which the Fair Debt Collection Practices Act is a part - it does not seem 'unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996).

Defendant's motion astutely points out that Courts use the "least sophisticated consumer standard" in determining what is meant by a collector's communication and whether the communication is false or misleading. Wade v. Regional Credit Ass'n, 87 F.3d 1098 (9<sup>th</sup> Cir. 1996); and Swanson v. Southern Oregon Credit Serv., 869 F.2d 1222 (9<sup>th</sup> Cir. 1988). However, Defendant's motion completely misconstrues the meaning behind the "least sophisticated consumer standard" and the effect it has on the statute's intent.

"The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993). In analyzing the "False or Misleading Representations" portion of the FDCPA, and the subsequent "Least Sophisticated Consumer Standard" adopted to interpret the same, Courts have held that the FDCPA is a remedial statute to be liberally construed in favor of the consumer. Johnson v. Riddle, 305 F.3d 1107 (10th cir. 2002). The "least sophisticated consumer" standard is an "objective test." Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389 (6<sup>th</sup> Cir. 1998).

In determining what is meant by a debt collector's communication with a debtor, the Court should keep in mind that the Fair Debt Collection Practices Act is a strict liability, remedial statute that must be liberally construed to the benefit of consumers. Baker v. G.C. Servs. Corp., 677 F.2d 775 (9th Cir. 1982); Johnson v. Riddle, 305 F.3d 1107 (10th cir. 2002); Fox v. Citicorp Credit Servs., Inc., 15 F.3d 1507 (9th Cir. 1994); Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th cir. 1985); Irwin v. Mascott, 94 F. Supp. 2d 1062 (N.D. Cal. 2000); Kaplan v. Assetcare, Inc., 88 F. Supp. 2d 1355 (S.D. Fla. 2000); Picht v. Hawks, 77 f. Supp. 2d 1041, 1043 (D. Minn. 1999); Ross v. Commercial Fin. Serv. Inc., 31 F. Supp. 2d 1077, 1079 (N.D. Ill. 1999); Ditty v. CheckRite, Ltd., 182 F.R.D. 639 (D. Utah 1998); Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999); Montgomery v. Huntington Bank & Silver Shadow Recovery, Inc., 346 F.3d 693 (6th Cir. 2003).

Additionally, the Washington Consumer Protection Act, of which the Collection Agency Act is a companion, requires Courts to liberally construe the



1 statute to the benefit of consumers. (See RCW 19.86.920)(stating: “To this end  
2 this act shall be liberally construed that its beneficial purposes may be served.)

3 Given the above, Defendant’s intent in drafting the letter is  
4 inconsequential. It matters even less whether the language contained in  
5 Defendant’s collection letter was technically true. The only issues to be resolved  
6 are whether the least sophisticated consumer would have understood the threat to  
7 report the debt to “credit bureaus throughout the country” as a threat to impair  
8 Plaintiffs’ credit ratings. This question must be answered in a manner that gives  
9 effect to the statutes at issue. Therefore, in answering the above question, the  
10 Court must be mindful of the fact that all questions of fact must be construed in a  
11 light most favorable to Plaintiffs (CR 56), the statutes at issue are remedial strict  
12 liability statutes, Defendant’s intent is inconsequential, Plaintiff’s impression of  
13 what was meant by the statement should be interpreted using the least  
14 sophisticated consumer test, which is an objective test, and the statutes and the  
15 facts of this case must be liberally construed to the benefit of Plaintiffs.

16 As a result, it is would be virtually impossible for this Court, or any other  
17 Court for that matter, to find that there are no genuine issues of material fact  
18 present in this case, and that Defendant should be given a pass in this lawsuit  
19 despite the fact that Defendant intentionally went perilously close to an area of  
20 proscribed conduct (*if Defendant did not dive directly into the area of proscribed*  
21 *conduct*). Therefore, Defendant should be held to account for such actions rather  
22 than being summarily dismissed from this lawsuit.

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**III. CONCLUSION**

Given the above, this Court should deny Defendant's motion and allow Plaintiffs to move forward with this case, until such time as discovery proves that Defendant has absolutely no liability whatsoever for the alleged violations.

DATED this 10<sup>th</sup> day of February, 2011.

Attorney for Plaintiffs

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 10, 2011, I electronically filed the foregoing (Response to Defendant's Motion to Dismiss) with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

**CREDIT PROTECTION ASSOCIATION, L.P.**, a Texas Limited Partnership, through its attorney: **DAVID ELKANICH**, at: Hinshaw & Culbertson, LLP, 1000 SW Broadway, Suite 1250, Portland, OR, 97201, 503-243-3243, delkanich@hinshawlaw.com.

Dated this 10th day of February, 2011.

Respectfully submitted,

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